

Olea-Reyes v. Gonzales 03-73531

APR 20 2006

CALLAHAN, Circuit Judge, concurring in part and dissenting in part

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In his removal proceedings, Olea-Reyes had the burden of proving that he was “clearly and beyond doubt . . . not inadmissible” as charged. 8 U.S.C. § 1229a(c)(2)(A). Based on a factual adverse credibility determination, the IJ concluded that Olea-Reyes did not meet his burden of proof. This court must uphold the agency’s factual findings “unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B); Chebchoub v. INS, 257 F.3d 1038, 1042 (9th Cir. 2001) (explaining that the substantial evidence standard is highly deferential to the Board of Immigration Appeals). Because a close examination of the record does not compel a result contrary to that reached by the IJ, Olea-Reyes has not met his burden of proving by substantial evidence that he clearly and beyond a doubt is not inadmissible to the United States. Accordingly, while I concur with Parts I and III of the memorandum disposition, I dissent from Part II.

The IJ’s conclusion—that Olea-Reyes withheld his true country of citizenship by saying that he was a United States citizen, and did not timely retract his false statement of United States citizenship—is supported by substantial evidence, including Olea-Reyes’s contradictory testimony and the totality of evidence before the immigration court.

Seven or eight hours after his arrival at the San Ysidro port-of-entry, Olea-Reyes was interviewed in Spanish by Officer Ibarguren. The interview was transcribed into a written report and was read to Olea-Reyes in Spanish. Olea-Reyes signed the report in the presence of a witness, affirming that his answers to Officer Ibarguren's questions were true and correct to the best of his knowledge. In response to Officer Ibarguren's question "Did you say you were born somewhere in the United States?" Olea-Reyes responded "I said to the officer that I was a United States citizen." Officer Ibarguren then asked "Do you think you are a United States citizen?" to which Olea-Reyes answered "no." Olea-Reyes also responded "no" to Officer Ibarguren's final question "Do you have any questions or is there anything else you would like to add?"

At the immigration court hearing, Olea-Reyes was questioned by his attorney, the government's attorney, and the IJ. When his attorney asked him "Why did you say you were a U.S. citizen if you're not?" Olea-Reyes answered "Because I didn't understand the lady exactly what she was trying to tell me." The IJ's conclusion that this statement contradicted Olea-Reyes's earlier statement to Officer Ibarguren makes sense. Olea-Reyes's testimony before the immigration court about being confused is inconsistent with his earlier statement claiming United States citizenship because Olea-Reyes never expressed any confusion to

Officer Ibarguren about his conversation with the initial immigration inspector when he answered Officer Ibarguren's questions or when Officer Ibarguren gave him the opportunity to provide a retraction or explain a supposed earlier retraction. His statement to the immigration court also contradicts his earlier statement to Officer Ibarguren because making a false claim to citizenship does not logically flow from any confusion Olea-Reyes says he encountered at the border. In other words, confusion is incongruous with a false statement claiming United States citizenship, which Olea-Reyes unequivocally admitted to making. These contradictory statements support the IJ's adverse credibility determination and his conclusion that Olea-Reyes was not confused at the border and did not offer a timely retraction of his statement of United States citizenship.

In making his adverse credibility determination, the IJ also relied on other evidence in the record. Specifically, Olea-Reyes did not offer his United States work papers to the primary or secondary inspector; instead, they were only discovered at the secondary inspection when Olea-Reyes was searched. Additionally, he was carrying a bogus Mexican birth certificate that was discovered during the search, suggesting that he understood the meaning and importance of citizenship. The IJ also noted that Olea-Reyes appeared to be a somewhat sophisticated man and that his explanation that he did not know what he

was saying or doing at the port-of-entry belied his demeanor. See Jibril v. Gonzales, 423 F.3d 1129, 1137 (9th Cir. 2005) (explaining that special deference to a credibility determination based on demeanor is proper because the IJ has the opportunity to make a first-person evaluation of all of the subtly conveyed factors that can be evidence of a petitioner's credibility).

Although not mentioned in the IJ's opinion, further evidence in the record supports the conclusion that Olea-Reyes was being untruthful when he testified before the immigration court. Olea-Reyes testified that he had his California drivers licence with him at the port-of-entry, but this is inconsistent with both the initial immigration inspector's report that Olea-Reyes claimed that he forgot his picture identification and the fact that no drivers license was ever presented to the immigration officials or found on him when he was searched.

The evidence before the immigration court, including (1) Olea-Reyes's unrefuted sworn statement to Officer Ibarguren that he told the initial immigration inspector that he was a United States citizen and his failure to qualify this statement in any way to Officer Ibarguren when given the opportunity to do so, (2) Olea-Reyes's failure to provide his United States work papers to the primary or secondary immigration inspector and his possession of an admittedly bogus Mexican birth certificate at the port-of-entry, and (3) Olea-Reyes's contradictory

testimony, demeanor and appearance before the IJ, provide specific and cogent reasons supporting the IJ's credibility determination. See Malhi v. INS, 336 F.3d 989, 993 (9th Cir. 2003) (requiring agency to provide specific and cogent reasons for disbelieving petitioner's testimony). The evidence, examined in its entirety, does not compel a reasonable adjudicator to concluded that Olea-Reyes's testimony to the IJ was truthful. Therefore, I would uphold the IJ's adverse credibility finding and his conclusion that Olea-Reyes did not timely retract his statement of United States citizenship, and I would deny the petition for review in its entirety.